



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Tom F. Coleman, Jr.
County Attorney
Angelina County
Lufkin, Texas

Dear Sir:

Opinion No. O-2855

Re: The applicability of any provision of the Penal Code of Texas to the described facts.

Your letter of October 22, 1940, requesting an opinion from this Department, reads in part as follows:

"During the recent primary elections a certain situation was found to exist in this county of sufficient seriousness that I deem it necessary to seek your advice. Each of the county commissioners in this county has charge of all road work in his precinct, and hires and fires his road workers. One of these commissioners employs a number of machinery men regularly, that is, while they are paid by the day, they work each day that the machinery is used. Prior to the first primary this commissioner gave part of these men three weeks off and employed additional men to run the machines. The men laid off were kept on the pay roll, and their names were turned in as having worked, and they were paid their regular salary. When this was later discovered, the commissioner stated that he was giving the men a vacation as he thought he had a right to do, and refunded to the county the money which had been paid the men. It was my ruling that men employed by the day by the county would not be given a vacation with pay. According to the Dallas News

Honorable Tom F. Coleman, Jr., Page 2

of August 29, 1940, the district attorney of Dallas County has also ruled that there can be no paid vacations for workers paid on an hourly basis. This ruling was acquiesced in and as previously stated the money was refunded.

"There is however some evidence that the payment made in this case was not intended as a paid vacation, since the commissioners court, the county auditor, and the county treasurer were not so informed until after there was considerable discussion of the matter.

"The question, therefore, on which I desire an opinion is whether or not the county commissioner and the road employees under the facts as given to you have violated any provision of the Penal Code. . . ."

Your inquiry involves mixed questions of law and of fact which cannot be categorically answered by this Department; they are determinable by a court or jury in a proper proceeding. We have, however, concluded as follows with reference to Articles 108 and 373, mentioned in your letter, and Article 95, each of the Penal Code.

Article 108 does not embrace the subject matter described; Article 373 requires a pecuniary interest in a contract, and under Article 95 an essential element is as described in *McKinzie v. State*, 92 S. W. (2d) 458:

"In order for an officer to be guilty under this statute, the money which he is charged with having misapplied or converted must have come into his custody or possession by virtue of his office. The words 'come into his custody or possession' we think mean that he was in actual possession thereof at the time of its conversion or misapplication."

See also *Hanna v. State*, 135 S. W. (2d) 105.

Consequently, it is the opinion of this Department that neither the County Commissioner nor the road employees have, under the facts given in your letter, violated Articles 108 or 373 or 95 of the Penal Code of Texas.

In view of the limited facts before us, we express no opinion with reference to other general provisions of the Penal Code such as those defining theft by false pretext, perjury or false swearing, and criminal conspiracy.

Honorable Tom P. Coleman, Jr., Page 3

In Opinion No. O-2754 this Department discussed other questions touching the subject matter of your request which you may find informative. We are, therefore, enclosing a copy of this opinion.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By

Zollie C. Steakley
Zollie C. Steakley
Assistant

ZCS:BBB

APPROVED DEC 6, 1940

Fred B. Mann
ATTORNEY GENERAL OF TEXAS

